88- 1775

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GARY E. PEEL,

Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

I. Does the First Amendment to the Constitution of the United States permit the Illinois Supreme Court, in direct and acknowledged conflict with two other State supreme courts, to impose public censure on an attorney for stating on his letterhead the truthful and readily verifiable fact that he had been certified as a specialist in civil trial advocacy by the National Board of Trial Advocacy?

II. Is a statement from one attorney to another attorney that did not itself propose a commercial transaction, and that was not directly or primarily used or designed to solicit a commercial transaction, subject to regulation as "commercial speech" simply because the statement could indirectly come to the attention of members of the public who might need legal services?

III. Does the First Amendment to the Constitution of the United States permit the Illinois Supreme Court to impose a blanket prohibition, rather than a less restrictive form of regulation, on *all* statements that an attorney is a certified specialist, when the statement at issue was not false, misleading or deceptive on its face, and was not shown to have misled anyone?

IV. Does the Equal Protection Clause of the Fourteenth Amendment permit application of a blanket prohibition to petitioner when statements concerning specialization in patent, admiralty or trademark law are exempted from the prohibition, and when attorneys may make the less meaningful and less verifiable statement that they "limit their practice to" or "concentrate their practice in" civil trial advocacy?

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Petitioner Gary E. Peel respectfully prays that a writ of certiorari issue to review the Order and Judgment of the Illinois Supreme Court entered on February 2, 1989.[1]

OPINIONS BELOW

The February 2, 1989 opinion and judgment of the Illinois Supreme Court adopting the recommendation of the Review Board of the Illinois Attorney Registration and Disciplinary Commission ("ARDC"), and imposing public censure on petitioner, is reported at 126 Ill.2d 397, 534 N.E.2d 980 (1989), and is reprinted in the Appendix to this petition at 1a. The one-page Report And Recom-

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[1] The parties to the proceeding below were petitioner and the Illinois Attorney Registration and Disciplinary Commission ("ARDC").

mendation Of The Review Board of the ARDC, entered February 17, 1988, is unreported and is reprinted at 16a. The Report of the Hearing Panel, Findings of Facts, Conclusion of Law and Recommendations of the Hearing Board of the ARDC, entered August 27, 1987, is unreported, and is reprinted at 17a.

JURISDICTION

The Order and Judgment of the Illinois Supreme Court was entered on February 2, 1988. Jurisdiction is conferred on this Court by 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 2-105(a) of the Illinois Code of Professional Responsibility (107 Ill. 2d R. 2-105(a)), provides:

> "Rule 2-105. Limitation of Practice
>
> (a) A lawyer shall not hold himself out publicly as a specialist, except as follows:

> (1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation 'Patents,' 'Patent Attorney,' 'Patent Lawyer,' or 'Registered Patent Attorney' or any combination of those terms, on his letterhead and office sign.
>
> (2) A lawyer engaged in the trademark practice may use the designation 'Trademarks,' 'Trademark Attorney' or 'Trademark Lawyer,' or a combination of those terms, and a lawyer engaged in the admiralty practice may use the designation 'Admiralty,' 'Proctor in Admiralty' or 'Admiralty Lawyer,' or a combination of those terms, in any form of communication otherwise permitted under Rules 2-101 through 2-104.
>
> (3) A lawyer or law firm may specify or designate any area or field of law in which he or its partners concentrates or limits his or its practice. Except as set forth in Rule 2-105(a), no lawyer may hold himself out as 'certified' or a 'specialist.'" (107 Ill.2d R. 2-105.)

STATEMENT OF THE CASE

The relevant facts are simple and undisputed.[2] Petitioner was licensed to practice law in Illinois in 1968, in Arizona in 1979, and in Missouri in 1981. Hearing Transcript ("H.Tr.") at 23; 28a. In 1981, after satisfying the rigorous standards of the National Board of Trial Advocacy ("NBTA"), petitioner was certified by the NBTA as a specialist in civil trial advocacy. H.Tr. at 26; 30a.

Founded in 1976, NBTA is an organization dedicated to improving the quality of the trial bar and enhancing

[2] At the hearing before the Hearing Board of the ARDC on July 27, 1987, the attorney for the Administrator of the ARDC stated in both his opening and closing arguments that "the facts" were "about as simple" as any case the Board would ever see. Hearing Transcript ("H.Tr.") at 13 and 38; 25a and 34a.

the delivery of legal services to the public by providing a reliable national credentialling process for specialists in trial advocacy. NBTA certifies only those who meet its exacting objective standards of experience, ability and concentration in trial advocacy.[3] The organization is sponsored by the American Trial Lawyers Association, the International Society of Barristers, the National Association of Criminal Defense Attorneys, the National Association of Women Lawyers, the American Board of Professional Liability Attorneys, and the National District Attorneys' Association. And it is overseen by a distinguished board of judges, practitioners and academics.

In 1983, petitioner began placing on his letterhead the truthful statement that he was certified as a civil trial specialist by the National Board of Trial Advocacy.[4] Petitioner then used that letterhead in the "ordinary course" of his practice of law. H.Tr. at 21; 26a. He did not use

[3] Certification as a civil trial specialist requires membership in good standing of a state bar, at least five years of actual practice in civil trial law in the period immediately preceding application, a showing that at least 30% of the attorney's time during the five year period has been spent in civil trial practice, appearance as lead counsel in at least fifteen civil matters through judgment (including not less than 45 days of trial, and at least 5 jury trials), appearance as lead counsel in at least forty additional matters involving the taking of testimony, participation in 45 hours of continuing legal education in civil advocacy in the three years preceding application, peer review by at least six attorneys (including a judge before whom the attorney has appeared), adequate written work, and successful completion of a rigorous day-long examination. *See* Brief *Amicus Curiae* of National Board of Trial Advocacy *in In re Gary E. Peel* NO. 87-SH-76.

[4] A reproduction of petitioner's letterhead can be found in the Appendix hereto at 21a. Petitioner's letterhead statement that he is a certified civil trial specialist by NBTA is accurate and non-misleading. Petitioner is, for example, listed in a directory of "Certified Specialists and Board Members" of NBTA. Furthermore, the State has not alleged, and no evidence was offered at petitioner's hearing to prove, that the letterhead statement was false or misleading as a factual matter.

the letterhead, or the statement that he was a certified specialist, as part of any direct effort to solicit new clients, and the ARDC has never claimed that he did. Specifically, petitioner has never used that statement "in the yellow pages," and he has "not mailed out brochures, advertisements or other types of printed materials" containing that statement. H.Tr. at 30; 31a.[5]

On April 15, 1986, while acting as an attorney for two *other* attorneys who were the subject of disciplinary proceedings before the ARDC, petitioner corresponded with his clients on his regular letterhead. This letter was attached as an exhibit to a submission by the clients to the ARDC. The Administrator of the ARDC noted the statement concerning certification by the NBTA on petitioner's letterhead, and himself initiated a complaint by the ARDC that was explicitly based on the letter from petitioner to his clients. No lawyer and no member of the public had (or has) ever complained to petitioner or to the ARDC about that statement.[6]

[5] Except for his letterhead, the fact of petitioner's certification by the NBTA was publicized in only two other ways. In 1981, when he was first certified (petitioner was recertified in 1986), "[t]here was a newspaper announcement in the business section of the local Edwardsville [Illinois] newspaper which said that basically that Gary Peel had been recently certified as a civil trial specialist by the National Board of Trial Advocacy . . . ." H.Tr. at 29; 31a. The fact of certification also appears in petitioner's Martindale-Hubbell listings. H.Tr. at 30; 31a.

[6] This fact is undisputed. At the hearing before the ARDC, petitioner testified as follows:

> "MR. BOSSLET: Q Let me finally ask you, Mr. Peel, because I alluded to it in my opening statement, has any client or layman ever questioned or expressd concern about your listing yourself being certified as the National Board of Trial Advocacy—.
>
> MR. MORAN: Objection. Calls for hearsay.
>
> CHAIRMAN WARREN: We'll let him answer.
>
> THE WITNESS: A No, I have never had any client or lay person question its propriety. The only thing that I have,

The complaint alleged, in relevant part, that petitioner's letterhead statement violated Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility, which states that except as provided in that rule, "no lawyer may hold himself out as 'certified' or a 'specialist.'" [7]

Beginning with his first communication with the ARDC concerning the charges against him, petitioner consistently, repeatedly, and at every available stage, challenged the constitutionality of the disciplinary rules and their application to him. He explicitly relied on the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, prior decisions of this Court, and the decisions of two other State Supreme Courts, both of which had held that their states could not constitutionally prohibit attorneys from truthfully advertising that they had been certified as civil trial specialists

as a result of the charges brought here today, I have called this to the attention of various other attorneys in my geographical area who have expressed some dismay with the charges, but there has been nothing from the lay person.

MR. BOSSLET: Q Have any attorneys, any other practicing attorneys complained to you about your listing that certification?

MR. MORAN: Same objection.

CHAIRMAN WARREN: Sustained."

H.Tr. at 35; 32a. And in response to interrogatories propounded by petitioner, the ARDC acknowledged that the only persons who "initiated the investigation of the charges which led to the filing of the Complaint" against petitioner were the administrator of the ARDC and his counsel.

[7] The exception clause is completely meaningless because nothing in Rule 2-105(a) permits any attorney in any circumstance to hold himself out as "certified" or as a "specialist" in any area of law. Although attorneys may hold themselves out as "patent lawyers," or "trademark lawyers," or "admiralty lawyers," and may say they "concentrate" or "limit" their practice to specified areas of law, nowhere does the rule permit any attorney to use the words "certified" or "specialist."

by the NBTA.[8] The Illinois Supreme Court considered and squarely rejected those federal constitutional challenges,[9] even though it acknowledged that two other state supreme courts had held that blanket prohibition of statements concerning certification or specialization—including statements concerning certification by NBTA—violated the First Amendment. 534 N.E.2d at 982; 4a-6a.

At the hearing on the complaint, the Administrator of the ARDC took the position that petitioner's letterhead violated Rule 2-105(a)(3) and was misleading *as a matter of law.*[10] The Administrator did *not* claim the letterhead was misleading as a matter of fact, and no evidence was presented that anyone had, in fact, been misled by the letterhead statement. The text of Rule 2-105(a)(3) does not itself require any showing that use of the words "certified" or "specialist" is misleading.[11] The Adminis-

[8] *See* 22a (petitioner's response to ARDC complaint). *See also* Petitioner's Motion to File First Set of Interrogatories; Petitioner's Motion to Dismiss ARDC Complaint.

[9] 534 N.E.2d at 983-986; 12a-14a (First Amendment); 534 N.E.2d at 986; 14a (Equal Protection).

[10] The attorney for the Administrator argued, as follows: "I believe it's a question of law whether or not the facts that have been presented here today show that what [petitioner] places on his letterhead is misleading or not . . . ." H.Tr. at 37; 33a. In interrogatories, petitioner had asked the Administrator to provide the names of any persons who considered his letterhead statement to be misleading. The Administrator responded that petitioner, not the Administrator, would have that information.

[11] *Other* disciplinary rules, which petitioner was *not* found to have violated, expressly turn on whether the communication at issue was or was not misleading. For example, Rule 2-101(b) prohibits "any commercial publicity or other form of public communication (including any newspaper, magazine, telephone directory, radio, television or other advertising)" unless that communication contains "all information necessary to make the communication not misleading" and does "not contain any false or misleading statement or otherwise operate to deceive." Petitioner was also charged with violation of Rule 2-101(b), and the Administrator

trator was apparently forced to argue that use of those words on petitioner's letterhead was misleading as a matter of law because the Administrator recognized that the *Constitution* prohibits state regulation of truthful attorney advertising unless it is misleading.[12]

Crucially, the Administrator did *not* claim that the NBTA was a bogus organization, or that certification by NBTA would not provide meaningful information to prospective consumers of legal services. To the contrary, the Administrator was willing to assume that NBTA is

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pressed that charge at the hearing. H.Tr. at 40-41; 34a-35a. Indeed, he referred to this charge as the *most important* levied against petitioner. *Id.* However, apparently because there was no evidence that petitioner's letterhead statement was, in fact, false, misleading or deceptive, the Hearing Board rejected that charge and only found petitioner in violation of Rule 2-105(a)(3). The Administrator did not take exceptions to or appeal from rejection of his charge under Rule 2-101(b). Consequently, the only rule at issue before the Review Board and before the Illinois Supreme Court was Rule 2-105(a)(3).

[12] In the Administrator's Memorandum to the Hearing Board opposing petitioner's motion to dismiss the disciplinary charges against him, the Administrator repeatedly expressed his belief, citing decisions of this Court, that the only attorney advertising that can *constitutionally* be regulated or prohibited is advertising that is false, misleading or deceptive. For example: "The United States Supreme Court, though, while holding that lawyer advertising is protected speech, has held that lawyer advertising can be regulated and in some instances, can be completely banned. The Court has justified this position by finding that advertising by the professions poses special risks of deception. . . . As to regulation of lawyer advertising, the United States Supreme Court had held, '[R]egulation—and imposition of discipline—are permissible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive.' *In re R.M.J.*, 455 U.S. 191, 202 (1982). Simply, lawyer advertising that is false, deceptive or misleading is subject to restraint. . . . In conclusion, [petitioner's] 'advertising' is misleading and therefore can be regulated by the Supreme Court of Illinois."

a legitimate organization and that certification by the NBTA would provide meaningful information to consumers. No other factual assumption was reasonably possible, given the stature and reputation of NBTA. As the Supreme Court of Minnesota recognized in an analogous context:

> "The NBTA is co-sponsored with the American Trial Lawyers Association, the International Academy of Trial Lawyers, The International Society of Barristers, the National Association of Criminal Defense Attorneys, the National Association of Women Lawyers, the American Board of Professional Liability Attorneys, and the National District Attorneys' Association. NBTA applies a rigorous and exacting set of standards and examinations on a national scale before certifying a lawyer as a trial specialist, either criminal or civil or both."

In re Johnson, 341 N.W.2d 282, 283 (Minn. 1983).

Similarly, the Task Force on Lawyer Competence of the Conference of Chief Justices found in a 1982 report that:

> "The National Board of Trial Advocacy, a national certification program that provides recognition for superior achievement in trial advocacy, uses a highly-structured certification process in addition to a formal examination to select its members. . . . [C]ertification by the National Board of Trial Advocacy is an arduous process that employs a wide range of assessment methods and entails considerable cost to the candidate."

Report With Findings and Recommendations to The Conference of Chief Justices, May 26 1982 (Publication Number NCSC-021).

In the view of the Administrator, however, a categorical ban on *all* certification programs was the only way the state could prevent "bogus" certification groups from

"popping up" and conferring meaningless certifications.[13] Thus, the Administrator argued that a flat ban on statements about certification and specailty was necessary as a prophylactic rule, even though the record in the present proceedings contained not a shred of evidence suggesting a risk of the harms such a rule is meant to guard against.

The Hearing Board did not find, in its findings of fact, that petitioner's letterhead statement about certification by the NBTA was misleading. Instead, the Board held, in its "Conclusion of Law," that the statement was misleading because the Illinois Supreme Court had not approved any form of certification: "We hold it is 'misleading' as our Supreme Court has never recognized or approved any certification process."[14] The Board gave no indication of how the absence of state approval might render the statement on petitioner's letterhead misleading, but presumably the Board acted in response to the arguments put before it by the Administrator. Thus, even though certification by the NBTA would provide meaningful information to consumers, the Administrator

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[13] The Administrator argued to the Hearing Board as follows: "In this case, the [state] interest is clearly the [Illinois Supreme] Court's interest in having *bogus* certification groups pop up or things that you just sign in correspondence courses, things of that nature, where the certification would be meaningless. The *Administrator doesn't argue either way about the meaningfulness of a certification by the National Board of Trial Advocacy*, but by having a *complete ban* on saying attorneys are certified or specialists, that is tailoring a substantial state interest that is protecting people from either meaningless or false information by having that ban an *entire ban* that is the best possible remedy to the situation that is before the Court." H.Tr. at 49-50 (emphasis added); 37a.

[14] Report of the Hearing Panel Findings of Facts, Conclusion of Law and Recommendations of the Hearing Board, at 5; 20a. The Hearing Board's use of quotation marks around the word misleading is consistent with its refusal to find petitioner's letterhead statement to be misleading as a matter of fact.

convinced the Board to impose a "prophylactic ban," because that prophylactic rule would block the emergence of "spurious certifying organizations whose certifications would be meaningless."[15]

The Illinois Supreme Court affirmed the Hearing Board's recommendation for public censure. The Court was somewhat more forthcoming as to the basis for its ruling. The primary basis for the court's decision was the purported need for a sweeping prophylactic rule to prevent deception of prospective clients. The Court made no effort to ascertain whether the actual statement on petitioner's letterhead either misled or could have misled prospective clients. Nor did the Court point to any *evidence* to support the purported risk of deception. The Court also held that petitioner's statement about certification was misleading because it might create the false impression that the State of Illinois—and not a private organization—had certified petitioner as a specialist. The Court did not explain how this impression might be created notwithstanding the explicit statement on the letterhead that petitioner was certified by the "*National* Board of Trial Advocacy." 534 N.E.2d at 986; 13a.

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[15] Memorandum of the Administrator in opposition to petitioner's motion to dismiss, at 5:

> "The substantial state interest involved in this situation is the protection of the public from false or misleading information. Lawyer advertising concerning the quality of legal services is inherently misleading. In addition, permitting claims of certification or specialty by attorneys in their advertising, would likely spawn spurious certifying organizations whose certifications would be meaningless. Therefore, a ban on this type of attorney advertising is appropriate.
>
> The prophylactic ban described above is the only means available to the Supreme Court of Illinois to advance its substantial state interest. Claims as to quality of legal services are not susceptible to measurement or vertification. Therefore, the only possible means of regulation in this situation is to ban claims of 'certification' or 'specialty.'"

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISIONS OF TWO OTHER STATE SUPREME COURTS, BOTH OF WHICH HAVE HELD THAT THE FIRST AMENDMENT DOES NOT PERMIT A COMPLETE PROPHYLACTIC BAN ON TRUTHFUL STATEMENTS BY ATTORNEYS THAT THEY HAVE BEEN CERTIFIED AS CIVIL TRIAL SPECIALISTS BY THE NATIONAL BOARD OF TRIAL ADVOCACY.

The Supreme Courts of Minnesota and Alabama have squarely ruled that the First Amendment does not permit a categorical ban on truthful statements by attorneys that they have been certified as civil trial specialists by the NBTA. *In Re Johnson*, 341 N.W.2d 282 (Sup. Ct. Minn. 1983); *Ex Parte Howell*, 487 So. 2d 848 (Sup. Ct. Ala. 1986). In the present case, the Illinois Supreme Court acknowledged that "[t]he courts in *Howell* and *Johnson* were confronted with issues similar to those in the case at bar," and recognized that those cases "held that a blanket prohibition on an attorney's claiming 'certified civil trial specialist' violates the first amendment." 534 N.E.2d at 982; 4a-6a. The Court also acknowledged that subsequent to the decision in *Johnson*, Minnesota had been able to establish procedures to *regulate* claims to certification without categorically *prohibiting* such claims: "Subsequently, the Minnesota Code of Professional Conduct was amended to provide for certification of organizations similar to NBTA by the State Board of Legal Certification . . . in order to protect the public from spurious agencies and meaningless certifications." 534 N.E.2d at 982; 5a.

Nevertheless, although fully aware of the crucial distinction between regulation and categorical prohibition, the Illinois Supreme Court rejected the holdings in *Howell* and *Johnson*, and ruled that Illinois' blanket prohibition of all references to certification or specialization did not

violate the First Amendment.[16] As a result of these rulings, the First Amendment, which is supposed to mean the same thing throughout the land, protects the right of attorneys to truthfully state they have been certified as civil trial specialists by the NBTA if those attorneys practice in Minnesota or Alabama, but not if they practice in Illinois.

The conflict among these State Supreme Court rulings reflects a broader conflict among the laws and rules of many States, about the permissible scope of State regulation of attorney statements concerning certification or specialty. In some states, whether by rule or by formal or informal opinion, attorneys are permitted to state that they have been certified by the NBTA.[17] In others, they are not.[18] And this precise issue is pending for resolution by bar associations or disciplinary commissions in many other states.[19] These divergent treatments of the issue are doubtless the result of widespread uncertainty as to the constitutional limits on State authority to regulate attorney statements about certification and specialization.

This case thus presents a square conflict between the Supreme Court of Illinois and the Supreme Courts of Alabama and Minnesota on an important First Amendment issue, and is representative of a broader conflict, on

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[16] This conflict implicates one of the principal grounds noted by this Court as favoring review by certiorari in Rule 17.1(b) of the Rules of this Court: "When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort of or a federal court of appeals."

[17] *E.g.*, Rule 7.4A of the Connecticut Rules of Professional Conduct.

[18] *E.g.*, Rule 7.4 of the Pennsylvania Rules of Professional Conduct; Rules 7.2 and 7.4 of the Mississippi Rules of Professional Conduct.

[19] For example, the issue is presently pending in North Dakota.

this precise issue, among many other states. The First Amendment question was squarely raised and decided, and the relevant facts are, by respondent's own account, simple and undisputed. Accordingly, this is a paradigmatic case for exercise of this Court's jurisdiction to grant certiorari.

II. THE COURT BELOW DECIDED THREE IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND THE RESOLUTION OF THESE ISSUES BELOW CONFLICTS WITH THE GOVERNING PRINCIPLES OF PRIOR DECISIONS OF THIS COURT.

A. This Court Should Decide Whether Truthful Statements By Attorneys That Do Not Themselves Propose A Commercial Transaction, And That Are Not Primarily Or Directly Used To Advertise Or Solicit Clients, Can Be Regulated As Commercial Speech.

The Supreme Court of Illinois assumed without analysis that the statements on petitioner's letterhead were "commercial speech," and therefore could be regulated under the less exacting First Amendment standards applicable to that category of expression. This conclusion is in direct conflict with the standards previously set forth by this Court for regulating commercial speech. Alternatively, this case raises an important, unresolved question as to the "precise bounds of the category of expression that may be termed commercial speech." *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985). *See generally* Supreme Court Rule 17.1(c).

Although commercial speech retains substantial First Amendment protection, "[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas v. Public Service Comm'n of New York*, 447 U.S. 557, 563 (1980). In particular, States may pro-

hibit false, deceptive or misleading commercial speech, and may regulate even nonmisleading commercial speech if the regulation serves a substantial state interest and is no broader than necessary to achieve that interest. *Id.* at 564-566. This Court has repeatedly defined "commercial speech" by reference to "'the "commonsense" distinction between speech proposing a commercial transaction . . . and other varieties of speech.'" *Id.* at 562 (quoting *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 455-456 (1978). *Accord Shapero v. Kentucky Bar Association*, 108 U.S. 1916 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985).

The expression at issue in this case—petitioner's accurate letterhead statement that he is a certified civil-trial specialist—does not itself propose a commercial transaction, and was not made in the context of proposing a commercial transaction. The communication that triggered the disciplinary proceedings against petitioner was a letter by him to clients he was representing in proceedings before the ARDC, which came to the attention of the ARDC administrator. The only communications by petitioner submitted in evidence at his disciplinary hearing were that letter and a subsequent letter by him to the ARDC. The second letter responded to the ARDC's notification that petitioner was, because of that first letter, the subject of a disciplinary investigation. In neither of those letters did petitioner propose that his services be retained. To the contrary, petitioner was simply exercising the right—itself protected by the First Amendment—to advise clients concerning charges brought by a government tribunal and to respond to charges against him made by that tribunal.

At petitioner's disciplinary hearing, the Administrator of the ARDC did not claim or attempt to prove that petitioner had used his letterhead, or the statement that he had been certified as a civil trial specialist by the NBTA, as part of a general advertising campaign, or in any ef-

fort to solicit legal business from the general public or from any individual. The Administrator was content to establish that, in addition to his two communications with the ARDC, petitioner had used his letterhead to "correspond with other attorneys," and "in the ordinary course of [petitioner's] business of practicing law." H.Tr. at 21; 26a.

Thus, there was no claim or evidence that petitioner's letterhead had ever been mailed to any layperson who was not already a client, or that petitioner had ever used that letterhead, or the statement concerning certification by the NBTA, in the yellow pages, or in any advertisements, brochures, or other types of printed materials, and petitioner testified that he had not.[20] The Illinois Supreme Court, though noting this fact, apparently considered it immaterial. 534 N.E.2d at 982; 4a.

In disciplining petitioner notwithstanding the absence of any evidence that the statement at issue was used to propose a commercial transaction, the Illinois Supreme Court extended the boundaries of regulable commercial speech far beyond any recognized by this Court. *Every* commercial speech case concerning attorneys decided by this Court has involved advertising or solicitation. *See, e.g., Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988) (solicitation letters to potential clients); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (advertisement); *In re R.M.J.*, 455 U.S. 191 (1981) (advertisements); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (personal solicitation); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (price advertising). The decision of the Illinois Supreme Court is in direct conflict with the governing principles of these decisions.

Of course, even though petitioner did not directly use his letterhead to solicit legal business, he did send his

[20] See note 4 *supra*, and accompanying text.

letterhead to other lawyers, and referrals by other lawyers constitute a substantial portion of petitioner's legal business. Thus, the present facts pose the question whether statements by attorneys that do not themselves propose commercial transactions and that are not primarily or directly used to advertise or solicit clients should be deemed regulable "commercial" speech, simply because those statements may indirectly influence the choices prospective clients make. *See Riley v. National Federation of the Blind of North Carolina*, 108 S. Ct. 2667, 2677 (1988) ("It is not clear that a professional's speech is necessarily commercial whenever it relates to that person's financial motivation for speaking").

This is a question of enormous importance for the legal profession, and for States seeking to regulate the practice of law. An attorney's participation in bar association and civic activities will often be motivated in part by a desire to enhance professional opportunities by acquainting others in the profession and the community with the attorney's special knowledge and expertise. Similarly, an attorney's listing in a professional directory will contain information as to background, education and experience that may well influence the choices prospective clients make.

By extending the boundaries of commercial speech in this area of particular sensitivity, the decision of the Illinois Supreme Court threatens to sow confusion. This Court should grant certiorari to make clear that the First Amendment does not permit States to regulate statements of the kind at issue in this case when such statements do not occur in the context of proposing a commercial transaction. Alternatively, if the First Amendment is to be read to permit some State regulation of attorney expression that does not directly propose a commercial transaction, this Court should grant certiorari to provide needed guidance about the precise bounds of "commercial speech" in this context. *See Zauderer*, 471 U.S. at 637 (bounds are "subject to doubt").

B. This Court Should Decide Whether Truthful And Readily Verifiable Statements Concerning Legal Experience Can Be Categorically Prohibited, Or Whether Such Outright Bans Violate The First Amendment.

If the statements on petitioner's letterhead *are* subject to State regulation as "commercial speech," the decision of the Illinois Supreme Court conflicts with applicable decisions of this Court limiting the scope of State regulation of commercial speech by attorneys. The case also presents an important question as to the extent to which a State may impose a blanket prohibition on accurate and readily verifiable statements concerning legal experience.

The decisions of this Court permit a State to prohibit commercial speech by an attorney only if that speech is inherently misleading. *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. at 1921; *Zauderer*, 471 U.S. at 644-645; *In re R.M.J.*, 455 U.S. at 202-203. Furthermore, "the States may not place an absolute prohibition on certain types of *potentially* misleading information . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. at 203 (emphasis added). Restraints on commercial speech by attorneys must "be narrowly crafted to serve the State's purposes." *Zauderer*, 471 U.S. at 644. A State seeking to justify a blanket prohibition must make a substantial showing that less restrictive alternatives will not suffice. *Id.* at 648-649.

In *Zauderer*, the Court refused to uphold broad prophylactic rules against advertisements purporting to give legal advice and against advertisements using illustrations. In that case, the State had failed to demonstrate that the risks associated with these forms of expression could not be controlled by less restrictive means. Similarly, in *In re R.M.J.*, the Court refused to uphold a prophylactic rule limiting the ways attorneys could describe their field of practice. As in *Zauderer*, the Court found that the State had failed to demonstrate that the harms against which

it sought to guard could not be controlled by less restrictive means.[21]

The holding of the Illinois Supreme Court in this case is in direct conflict with these decisions. The primary justification asserted by the State for the blanket prohibition on statements about certification and specialization is the risk that potential clients will be unable to draw reliable inferences from the information because they will not know whether the certifying organization is *bona fide* or "bogus."[22] There can be no question, however, as to the *bona fides* of NBTA, the certifying organization in this case. As in *Zauderer*, therefore, the State seeks to justify a prophylactic rule against statements about certification and specialization "notwithstanding that [the] particular advertisement has none of the vices that allegedly justify the rule." 471 U.S. at 644.

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[21] "Were we to accept the State's argument in this case, we would have little basis for preventing the government from suppressing other forms of truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising. The First Amendment protections afforded commercial speech would mean little indeed if such arguments were allowed to prevail. Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading and the harmless from the harmful"

Zauderer, 471 U.S. at 646.

[22] The State's other purported justification for the blanket prohibition—that prospective clients will be misled into thinking that certification implies *certification by the State of Illinois*—is a makeweight. The statement on petitioner's letterhead explicitly states that certification was by the *National* Board of Trial Advocacy. The possibility that a reader would misunderstand this statement as implying certification by the State of Illinois is remote at best Thus, as in *Zauderer*, the purported State interest "is belied by the facts" before this Court. 471 U.S. at 645.

The State has not made any showing that less restrictive means than a blanket prohibition would not control whatever risks might be posed by claims of certification and specialization. In particular, the State—without explanation—simply refused to follow the holding of the Alabama Supreme Court on the identical question, that risks of misleading prospective clients can be controlled by a procedure for State licensure of specialists and certifying organizations. *See Ex Parte Howell*, 487 So.2d at 851. This is remarkable in light of the Court's specific acknowledgment that Minnesota had required a licensure procedure as a less restrictive means of regulating attorney speech about specialization and certification. 534 N.E.2d at 982; 5a. Nor did the Illinois Supreme Court consider whether the risk of misleading prospective clients might be controlled by a rule requiring *more* disclosure of information about the certification of specialty. *See Bates v. State Bar of Arizona*, 433 U.S. at 374 ("the preferred remedy is more disclosure rather than less").

At bottom, the State seeks to justify its blanket prohibition by reference to this Court's dictum in *In re R.M.J.*, that claims as to the quality of legal services "might be so likely to mislead as to warrant restriction." 534 N.E.2d at 984; 9a-10a (quoting 455 U.S. at 201). Equating statements about certification with claims about quality, the State argues that statements about certification are inherently misleading, and can therefore be banned. The holdings in *In re R.M.J.* and subsequent cases, however, do not support any such blanket restriction. Although this Court's prior cases have "left open the possibility that States may prevent attorneys from making *nonverifiable* claims regarding the quality of their services, they do not permit a state to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas." *Zauderer*, 471 U.S. at 640 n.9 (emphasis added).

In the present case, of course, petitioner has not made a nonverifiable, subjective claim as to the quality of his legal services. He has made a factual statement about certification; both the fact of certification and the level of experience to which certification attests are readily verifiable. This statement might lead some prospective customers to infer expertise in trial advocacy, but there is no reason to believe that the inference is misleading.

Although this Court's decisions do not support the State's claim that it can constitutionally prohibit *all* statements from which a prospective client might infer expertise or quality, the ruling below does illustrate significant confusion in the States about the extent to which attorney statements about competence may constitutionally be regulated. Obviously, such statements can range from wholly subjective assessments of skill—such as "he is an exceptional litigator"—to wholly factual statements about background, training and specialization from which competence can be inferred—such as the statement about NBTA certification at issue here. The facts of this case amply demonstrate the need for a discriminating analysis —as yet unarticulated by this Court—that accounts for the wide variation in types of statements about competence and experience.

Finally, blanket prohibitions of information about attorney certification disserve the very interests sought to be protected by this Court's decisions extending substantial First Amendment protection to commercial speech. The flat prohibition imposed by Illinois deprives prospective clients of information about programs that serve to *enhance* the quality of representation an attorney can offer. Far from being the "bogus" enterprises suggested by the State, NBTA and other certification programs in trial advocacy fulfill extremely important and unmet public needs. Former Chief Justice Warren E. Burger was among the first to recognize these needs and to urge certification programs to meet them. Over fifteen years ago Chief Justice Burger recognized "that some system

of certification for trial advocates is an imperative and long overdue step." [23] In his view, our failure to certify trial advocacy skills "has helped bring about the low state of American trial advocacy and a consequent diminution in the quality of our entire system of justice." [24] He expressly recommended "certification of the one crucial specialty of trial advocacy that is so basic to a fair system of justice and has had historic recognition in the common law systems." [25]

The Conference of Chief Justices (of the States) has also squarely endorsed specialization programs "as a means to ensure competent counsel and to enable the public to select the best representation of their interests." [26] The Conference of Chief Justices acknowledged that "specialization is a means to ensure competent representation that has been reviewed intensively in recent years by enhancing the performance of the bar and the ability of the public to identify appropriate counsel." [27] Two years later the Conference of Chief Justices approved a "Model State Court Lawyer Competence Program" that had been developed by the Conference of Chief Justices Committee on Lawyer Competence. That program is reprinted in "Promoting Lawyer Competence," 10 *State Court Journal* (Fall 1986) at 15-23. The model program expressly recommends that state supreme courts "should adopt rules that provide specific guidelines and

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[23] Burger, Warren E., "The Special Skills of Advocacy: Are Specialized Training and Certification or Advocates Essential to Our System of Justice?", 42 Fordham L. Rev. 227 (1973), at 227.

[24] *Id.* at 230.

[25] *Id.* at 240. See also at 239 and 241.

[26] Conference of Chief Justices' Resolution VII, titled "Court Recognition of State Specialization Plans," adopted by the Conference of Chief Justices Coordinating Council on Lawyer Competence at the Conference of Chief Justices Annual Meeting on August 2, 1984.

[27] *Id.*

formal structures under which attorneys may be provided . . . recognition or certification as specialists." *Id.* at 21.

Of course, the fact that a particular lawyer has been certified as a trial specialist will be of no assistance whatsoever to members of the public who are seeking experienced trial counsel unless that fact can be communicated to them. But as the United States noted in its *amicus* brief in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), "[u]nfortunately, however, there is not now sufficient information available to the public concerning legal services. Study upon study, author after author, reveals the gross ignorance of the public with respect to lawyers and legal services. . . . One of the major causes of this ignorance is doubtless the ban lawyers have imposed upon the dissemination of information about their services, their prices, and even their existence." *Amicus* brief at 24. That unfortunate fact was noted in the Court's opinion in *Bates*: "[s]tudies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services *or because of an inability to locate a competent attorney.*" 433 U.S. at 370 (emphasis added). The ruling of the Illinois Supreme Court in this case exacerbates this problem.

C. The Court Should Decide Whether Illinois' Categorical Prohibition On Attorney Statements Containing The Words "Certified" Or "Specialist" Rationally Furthers Any Legitimate State Interest, Or Whether That Prohibition Violates The Equal Protection Clause Of The Fourteenth Amendment Because Attorneys Are Permitted To Communicate Similar Information So Long As They Do Not Use The Forbidden Words.

The State's prohibition of attorney statements about certification and specialization also conflicts with applicable decisions of this Court because—in the context of the rules governing attorney conduct in Illinois—the prohibition does not rationally further any legitimate state

interest. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

In Illinois, attorneys are explicitly *permitted* to make statements that they specialize in patent, trademark or admiralty law. They are also explicitly permitted to say that they "concentrate" their practice in particular specialty areas. Both the specific statements about specialization and general statements that attorneys concentrate in specific fields are factual statements from which prospective clients can and will draw inferences about the likely quality of an attorney's services, or the attorney's experience. A client with a tax problem, for example, will be more likely to pick an attorney who holds herself out as "concentrating" in tax because the client will reasonably assume that the attorney is better able to handle a tax problem than a lawyer with no experience in the field. Statements about speciality in admiralty, trademark or patent law, and statements of concentration in other fields, are thus indistinguishable in all relevant respects from the statement that petitioner is certified by the NBTA as a civil trial specialist. Indeed, if anything the statement at issue in the present case is *more* reliable than those permitted by Illinois law because NBTA's rigorous requirements for certification provide significant assurance that a certified attorney is in fact exceptionally qualified, whereas vague statements about "concentration" contain no such implicit assurance.

Accordingly, the distinction drawn in Illinois law between impermissible claims of certification or specialization and permissible statements about specialization in admiralty, patent and trademark law, and about concentration in a particular field is utterly irrational, and violative of the Equal Protection clause of the Fourteenth Amendment.[28]

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[28] Furthermore, Rule 2-105(a) burdens the fundamental right of access to the courts by unjustifiably depriving potential litigants of valuable information that would materially enhance their ability to obtain relief in the judicial system. The rule violates the Equal Protection clause for this reason as well.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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May 2, 1989

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APPENDICES

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APPENDIX A

SUPREME COURT OF ILLINOIS

No. 66771

IN RE GARY E. PEEL, ATTORNEY,
Respondent.

Feb. 2, 1989

William F. Moran, III, of Springfield, for the Administrator of the Atty. Registration and Disciplinary Commission.

Robert W. Bosslet, of Morris B. Chapman & Associates, of Granite City, for respondent.

Eugene I. Pavalon, of Chicago, and Jeffrey R. White, of Washington, D.C., for amicus curiae Association of Trial Lawyers of America.

Timothy Wilton, of Boston, Massachusetts, for amicus curiae National Board of Trial Advocacy.

Justice RYAN delivered the opinion of the court:

Gary E. Peel is an attorney licensed to practice law in the State of Illinois. In 1983, the respondent, Peel, began placing on his letterhead that he was certified as a civil trial specialist by the National Board of Trial Advocacy (NBTA). Rule 2-105(a) of the Illinois Code of Professional Responsibility prohibits an attorney from holding himself out as "certified" or a "specialist" other than in fields of admiralty, trademark, and patent law. (107 Ill.2d R. 2-105(a).) A panel of the Hearing Board of the Attorney Registration and Disciplinary Commission

(ARDC) recommended that the respondent be censured, and the Review Board affirmed the panel's recomendation. The respondent filed exceptions with this court concerning the Review Board's finding that his conduct was misleading and its recommendation that he be censured. This case presents the issue of whether Rule 2-105(a) is unconstitutional as applied to attorneys' advertising certification by the NBTA, because it violates the first amendment guarantee of free speech.

The basis for the alleged violation of Rule 2-105(a)(3) was respondent's professional letterhead, which reads:

> "Gary E. Peel
> Certified Civil Trial Specialist
> By the National Board of Trial Advocacy.
> Licensed: Illinois, Missouri, Arizona"

Rule 2-105 of the Illinois Code of Professional Responsibility provides:

"Rule 2-105. Limitation of Practice

(a) A lawyer shall not hold himself out publicly as a specialist, except as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation 'Patents,' 'Patent Attorney,' 'Patent Lawyer,' or 'Registered Patent Attorney' or any combination of those terms, on his letterhead and office sign.

(2) A lawyer engaged in the trademark practice may use the designation 'Trademarks,' 'Trademark Attorney' or 'Trademark Lawyer,' or a combination of those terms, and a lawyer engaged in the admiralty practice may use the designation 'Admiralty,' 'Proctor in Admiralty' or 'Admiralty Lawyer,' or a combination of those terms, in any form of communication otherwise permitted under Rules 2-101 through 2-104.

(3) A lawyer or law firm may specify or designate any area or field of law in which he or its partners concentrates or limits his or its practice. Except as set forth in Rule 2-105(a), no lawyer may hold himself out as 'certified' or a 'specialist.'" (107 Ill.2d R. 2-105.)

The Administrator for the ARDC asserts that respondent's holding himself out as a civil trial specialist certified by the NBTA is misleading, because this court does not recognize any such specialty. The Administrator contends that the advertisement is misleading in three ways. First, a person reading respondent's letterhead would be led to believe that respondent is a specially qualified attorney. Because this court licenses attorneys in this State, the Administrator claims that a reader might be led to believe that this court certifies respondent's claimed specialty. Second, the Administrator contends that the terms "certified" and "specialist" are technical in nature and could easily mislead the public. Third, respondent's advertisement, according to the Administrator, must be construed as a claim to the quality of legal services he provides, which is inherently misleading.

The respondent contends that the Supreme Court has extended the first amendment protection of commercial speech to lawyers' advertisements by prohibiting the State's right to subject lawyer advertising to a "blanket suppression." (See *Bates v. State Bar* (1977), 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810.) Although the respondent acknowledges that the Supreme Court held that misleading advertising by attorneys may be prohibited entirely (see *In re R.M.J.* (1982), 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64), he asserts that his claim that he is certified as a civil trial specialist by the NBTA would not mislead the public but instead would provide them with truthful, relevant information which would be helpful in the selection of a lawyer.

Similarly, the respondent asserts that claiming he is certified as a civil trial specialist is not even potentially misleading because it is a truthful statement. Furthermore, because the statement is not potentially misleading, the respondent contends, the State, at a minimum, is obligated to assert a substantial interest in order to prohibit the speech. In support of the assertion that the State has failed to establish a substantial interest in prohibiting the respondent from claiming he is a certified civil trial specialist, the respondent notes that Rule 2-105(a) allows admiralty attorneys to claim specialization without requiring the attorney to have any experience in that field of practice. Thus, the respondent claims the State has failed to establish a substantial interest in prohibiting the designation of certified civil trial specialist because it is not misleading or deceptive on its face. According to the respondent, the prohibition of Rule 2-105 is too restrictive because his designation of certified civil trial specialist cannot possibly mislead the public because it only appears on his professional letterhead which is generally sent to other lawyers and *present* clients.

Finally, respondent urges this court to follow two State supreme court cases which have held that a blanket prohibition on an attorney's claiming "certified civil trial specialist" violates the first amendment. (See *Ex parte Howell* (Ala.1986), 487 So.2d 848; *In re Johnson* (Minn. 1983), 341 N.W.2d 282.) The courts in *Howell* and *Johnson* were confronted with issues similar to those in the case at bar: Does the first amendment prohibit a State's proscription of advertising the designation of certified civil trial specialist by the NBTA? The Alabama Code of Professional Responsibility provided that it was inappropriate for an attorney to hold himself out as a specialist except in the historically accepted fields of admiralty, trademark and patent law. (*Ex parte Howell*, 487 So.2d at 849.) The Alabama Supreme Court held that the "advertisement of certification by the NBTA as a civil trial advocate would not be misleading or deceptive on its

face." (*Ex parte Howell*, 487 So.2d at 851.) The court, in *Howell*, noted that the public should be protected from potentially misleading representations and, therefore, directed the bar association to formulate a proposed rule and method for approving certifying organizations similar to the NBTA. (487 So.2d at 851.) Similarly, in *In re Johnson* the Minnesota court held that the disciplinary rule prohibiting lawyer advertising of a legitimate specialization certification was unconstitutional, in view of its overbreadth. The Minnesota court noted that members of the general public could be misled by claims of specialization when no guidelines for specialization in the profession had been drawn. The court noted, however, that the hearing panel of the Board of Professional Responsibility found that the advertisement was not misleading or deceptive. (*In re Johnson*, 341 N.W.2d at 285.) Subsequently, the Minnesota Code of Professional Conduct was amended to provide for certification of organizations similar to NBTA by the State Board of Legal Certification (Minnesota Rules of Professional Conduct, Rule 7.4 (b)), in order to protect the public from spurious agencies and meaningless certifications.

Amicus curiae the National Board of Trial Advocacy urges this court to follow other States which have amended their ethics rules to permit a statement of specialty certification so long as the lawyer is certified by an approved agency with rigorous standards. (See, *e.g.*, Alabama Code of Professional Responsibility, Temporary D.R. 2-112; Connecticut Rules of Professional Conduct, Rule 7.4A.) The NBTA noted in its brief that the States which have programs regulating the advertising of specialty certification have approved the NBTA because it is a reputable organization with rigorous and comprehensive certification standards.

Amicus submits that an attorney's claiming certification by the NBTA is not misleading or even potentially misleading. Moreover, *amicus* contends that certification

by the NBTA is precisely the sort of information which should be conveyed to the public and which is protected by the first amendment.

We begin our analysis of the issues by reviewing the constitutional limitations on the regulation of lawyer advertising. In *Bates v. State Bar* (1977), 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810, the Supreme Court declared that the first amendment protects some attorney advertising from State prohibition. The Court held that prohibitions on the advertising of legal fees for routine legal services were unconstitutional. (433 U.S. at 382, 97 S.Ct. at 2708, 53 L.Ed.2d at 834-35. The Court stated: "[C]ommercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." (433 U.S. at 364, 97 S.Ct. at 2699, 53 L.Ed.2d at 823.) The Court, in *Bates*, further noted that a complete ban on advertising is "highly paternalistic" (433 U.S. at 365, 97 S.Ct. at 2699, 53 L.Ed.2d at 824) and stated that "the preferred remedy is more disclosure, rather than less" (433 U.S. at 375, 97 S.Ct. at 2704, 53 L.Ed.2d at 830).

Following the landmark case of *Bates*, the Supreme Court resolved the issue of whether an attorney could be limited to a list of categories when describing his area of practice in an advertisement. (*In re R.M.J.* (1982), 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64.) In *In re R.M.J.*, attorney R.M.J. was disciplined by the Missouri Supreme Court because he listed in a newspaper advertisement areas of practice, some of which were not among the areas of practice designations allowed by the State disciplinary rules, and others deviated from the permitted terminology to describe the area. For example, R.M.J. advertised that he practiced "securities—bonds" and "personal injury." The governing rules did not provide for the listing of "securities—bonds," and "personal injury" was required to be listed as "tort law." Additionally, the advertisement stated that R.M.J. was admitted to practice before the United States Supreme Court, which was information not permitted under the State disciplinary rules. Finally, the advertisement failed to include the mandatory disclaimer of expertise. R.M.J. challenged all the prohibitions except for the validity of the disclaimer requirement. The Court, in *R.M.J.*, reemphasized that States could regulate claims of quality because they are more likely to mislead when the advertisement involves professional services. (455 U.S. at 201, 102 S.Ct. at 936, 71 L.Ed.2d at 73.) The Court then summarized the commercial speech doctrine as applied to advertising for professional services as follows:

> "Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, *e.g.*, a listing of areas of practice, if the information also may be presented in a way that is not deceptive." (*In re R.M.J.* (1982), 455 U.S. 191, 203, 102 S.Ct. 929, 937, 71 L.Ed.2d 64, 74.)

The Court found that the restriction on the listing of areas of practice did not serve a substantial State interest and reversed the discipline as contrary to the first amendment. 455 U.S. at 205, 102 S.Ct. at 938, 71 L.Ed. 2d at 75.

More recently, in *Zauderer v. Office of Disciplinary Counsel* (1985), 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652, the Supreme Court once again reviewed the discipline of an attorney for advertising. Zauderer was disciplined by the Ohio Supreme Court for placing an ad-

vertisement in a newspaper which (1) contained an illustration of a medical device alleged to have caused injuries to women; (2) solicited legal employment from other women who may have been injured by the medical device; and (3) stated, "[i]f there is no recovery, no legal fees are owed by our clients," but failed to include a statement that the client must pay litigation costs even if the lawsuit should be unsuccessful. (*Zauderer v. Office of Disciplinary Counsel* (1985), 471 U.S. 626, 630-33, 105 S.Ct. 2265, 2271-72, 85 L.Ed.2d 652, 659-61.) The Court held that it was permissible to discipline Zauderer for failing to disclose the responsibility for costs in contingent fee cases, but that the State could not impose discipline for the illustration or solicitation of employment through the newspaper advertisement. The Court held that mandatory disclosure of costs in contingent fee cases did not overly restrict the flow of information, because it permitted the advertisement of contingent fees but was necessary so that potential clients would no be misled into thinking that they would not have any expenses if the litigation was not successful. 471 U.S. at 650-53, 105 S.Ct. at 2281-83, 85 L.Ed.2d at 671-73.

The issue presented in this case is whether the current disciplinary rule of this court prohibiting the respondent from advertising certification by the NBTA survives recent decisions of the United States Supreme Court. As previously noted, the Administrator for the Attorney Registration and Disciplinary Commission (ARDC) asserts that respondent's claim of certification by the NBTA is misleading and, therefore, can be banned entirely.

The respondent contends that the ARDC failed to present any evidence concerning the potential of the claim of certification by the NBTA to mislead and, therefore, the State at a minimum must establish a *substantial interest* to warrant the blanket suppression. We do not

agree. The deception and confusion is particularly apparent in this case for two reasons. First, the claim of certification by the NBTA impinges upon the sole authority of this court to license attorneys in this State and is misleading because of the similarity between the words "licensed" and "certified." Webster's dictionary defines "certificate" as "a document containing a certified and usually official statement * * *, especially: a document issued by * * * a state agency * * * certifying that one has satisfactorily * * * attained professional standing in a given field *and may officially practice or hold a position in that field.*" (Emphasis added.) (Webster's Third New International Dictionary 366 (1986)). A "license" is defined by Webster's as "a right or permission granted * * * by a competent authority to engage in a business or occupation * * * or to engage in some transaction which *but for such license would be unlawful.*" (Emphasis added.) (Webster's Third New International Dictionary 1304 (1986).) Indeed, it is apparent from the foregoing that the general public could be misled to believe that the respondent may practice in the field of trial advocacy solely because he is certified by the NBTA. In respondent's letterhead, which we have set out above, directly below the statement concerning certification is the following: "Licensed: Illinois, Missouri, Arizona." The letterhead contains no indication that the licensure was by official organizations which had authority to license, whereas the certification was by an unofficial group and was purely a voluntary matter.

Additionally, the claim that the respondent is certified as a civil trial specialist by the NBTA is misleading because it tacitly attests to the qualifications of the respondent as a civil trial advocate. Because not all attorneys licensed to practice law in Illinois are certified by the NBTA, the assertion is tantamount to a claim of superiority by those attorneys who are certified. Notably, the Supreme Court has stated that claims as to the quality of legal services "might be so likely to mislead as to war-

rant restriction." *In re R.M.J.* (1982), 455 U.S. 191, 201, 102 S.Ct. 929, 936, 71 L.Ed.2d 64, 73.

Contrary to our finding, the *amici* and respondent insist that the claim of certification by the NBTA is not misleading. They argue that because of the rigorous standards of the NBTA, such certification carries with it a degree of assurance to the public of the attorney's competence. However, it is interesting to note that none of the briefs filed in support of the respondent agree as to what standards an attorney must meet to receive certification from the NBTA. In the respondent's brief, it is stated that "[t]o obtain certification by the National Board of Trial Advocacy, an attorney must have * * * acted as lead counsel in at least 40 jury trials carried to verdict, or 100 non-jury matters tried to conclusion, successfully score on a six-hour written examination, maintain continuing participation in continuing legal education, and obtained other standards and achievements." The Association of Trial Lawyers of America filed an *amicus* brief, in which it is stated that the primary requirements for certification "are that the attorney have at least five years experience in civil practice, including experience as lead counsel in at least 15 major cases tried to verdict." The National Board of Trial Advocacy also filed an *amicus* brief, in which it is stated that, to be certified, an attorney must "have appeared as lead counsel in not less than 15 complete trials of civil matters to verdict or judgment, including not less than 45 days of full trial; at least five of these trials must be to a jury. In addition, applicants must have appeared as lead counsel in at least forty additional contested matters involving the taking of testimony. These may include trials, evidentiary hearings, depositions, or motions heard before or after trial." Does certification mean that the attorney has tried 40, 15, or 5 jury trials to verdict? Does the requirement concerning 40 contested matters refer to 40 jury cases tried to verdict, as the respondent asserts, or

simply 40 hearings on motions, depositions and nonjury trials, as the National Board of Trial Advocacy claims? If certification conveys such a varied and uncertain understanding as to its meaning to the attorneys who are in this case contending for the cause of certification, and who should be knowledgeable as to its meaning, how much more confusing is the statement that an attorney is certified as a trial specialist likely to be to the general public?

In *In re Johnson* (Minn.1983), 341 N.W.2d 282, the Minnesota court acknowledged that members of the general public could be misled by claims of specialization when no guidelines for specialization in the profession have been drawn. In *Johnson*, however, since the hearing panel had found that the advertisement was not misleading or deceptive, the Minnesota court found that the blanket ban of its disciplinary rule was over-broad.

We are not confronted, as the Minnesota court was, by such a finding of our hearing panel. In our case, the hearing panel found that the letterhead with its statement that the respondent was certified as a trial specialist was misleading and deceptive. As noted above, in discussing *In re R.M.J.*, advertising which is misleading may be prohibited entirely.

The American Bar Association Model Rules of Professional Conduct were adopted by the House of Delegates of the American Bar Association in 1983. Rule 7.4 of the Model Rules contains a prohibition against a lawyer's holding himself out as a specialist similar to that contained in Rule 2-105 of our Code of Professional Responsibility, with the addition of an exception on designation of specialization of the particular State. The comment to Model Rule 7.4 says that a lawyer is permitted to indicate that he practices in certain fields or will not accept matters except in such fields. "However, stating that the lawyer is a 'specialist,' or that the lawyer's prac-

tice is limited to and 'concentrated in' particular fields is not permitted. These terms have acquired a secondary meaning implying formal recognition as a specialist. Hence, use of those terms may be misleading unless the lawyer is certified or recognized in accordance with procedures in the state where the lawyer is licensed to practice."

In a draft of the American Bar Association Standing Committee on Ethics and Professional Responsibility Report to the House of Delegates (Draft Report), dated August 29, 1988, it was recommended that the black letter of Model Rule 7.4 remain unchanged, but that the comment be amended to delete the language which states that a lawyer may not say that his practice is "limited to" or "concentrated in" particular fields. The Draft Report discusses *Bates*, *In re R.M.J.* and *Zauderer*, and concludes:

> "While these opinions appear to support a Rule 7.4 prohibition of a lawyer describing himself or herself as a 'specialist' except in certain limited areas, they also lead to questions about the language of the Comment to Rule 7.4 which prohibits a lawyer from advertising that his or her services are 'limited to' or 'concentrated in' particular fields." (Draft Report, at 3.)

Under the heading "Policy Consideration," the Draft Report states:

> "In view of the desirability of promoting accurate communication by lawyers concerning their services and experience, absolute prohibition of the phrases 'limited to' and 'concentrated in' is unwarranted. These phrases can provide valuable information to a consumer. Unlike the terms 'specialist,' 'practices a speciality' and 'specializes in,' the phrases 'limited to' and 'concentrated in' lack the clear implication of formal recognition of a specialist. Therefore, the comment to Rule 7.4 should not prohibit statements that a lawyer's practice is 'limited to' or 'concentrated in' a particular field." Draft Report, at 5.

The comment to Rule 7.4, after the recommended changes, would read:

> "This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services, for example, in a telephone directory or other advertising. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate. However, a lawyer is not permitted to state that the lawyer is a 'specialist,' practices a 'speciality,' or 'specializes in' particular fields. These terms have acquired a secondary meaning implying formal recognition as a specialist and, therefore, use of these terms is misleading. [An exception would apply in those States which provide procedures for certification or recognition of specialization and the lawyer has complied with such procedures. See Section (c) of this Rule.]" Draft Report, at 1.

Thus, the conclusion of the Draft Report is that the terms "specialist" or "practices a specialty" or "specializes in" particular fields have acquired a secondary meaning implying formal recognition as a specialist and use of these terms is misleading, except in States which provide procedures for such certification. This conclusion conforms to the findings of the Hearing Board in the case before us that the statement as used by the respondent on his letterhead is misleading. This is particularly so when the statement was used on respondent's letterhead in conjunction with information about official licensures in Illinois, Missouri and Arizona. As noted above, the Supreme Court in *In re R.M.J.* stated that misleading advertising may be prohibited entirely. (455 U.S. at 203, 102 S.Ct. at 937, 71 L.Ed.2d at 74.) This State has not provided any procedure for formal recogni-

tion of specialists in the practice of law. Therefore, the use of the information on respondent's letterhead stating that he is certified as a trial specialist by the National Board of Trial Advocacy is misleading. Rule 2-105(a) of our Code of Professional Responsibility, prohibiting the use of the term "specialist," is not violative of respondent's constitutional right of free speech.

Finally, respondent asserts that there is no rational justification for allowing attorneys practicing in admiralty to claim to be a specialist and not attorneys certified by the NBTA. In support of this assertion, respondent notes that "proctor in admiralty or trademarks lawyer" does not require that attorney to have any experience in those fields of practice. It should be noted at the outset that an attorney holding himself out as a specialist is distinct from a claim of certification. The claim of certification is potentially more misleading because it tacitly asserts "qualified." (See C. Wolfram, Modern Legal Ethics 205 (1986).) Additionally, allowing attorneys practicing in admiralty to advertise their specialties in no way implies that the admiralty attorney is more capable than any other admiralty attorney because all such attorneys may advertise the fact. Moreover, the historical basis for allowing attorneys specializing in patent, trademark and admiralty law to advertise their specialization had to deal with the difficulty of the general public in finding attorneys who practiced in such fields. (See *Silverman v. State Bar* (5th Cir. 1968), 405 F.2d 410, 414.) This historical distinction is not without difference; locating an attorney who is a civil trial advocate would not involve the same difficulty. Because Rule 2-105 permits attorneys or firms to designate areas in which their practices are concentrated or to which their practices are limited, so long as these claims do not imply certification by this court, Rule 2-105 is therefore not overly restrictive. See 107 Ill.2d R. 2-105, Committee Comments, at 624.

We adopt the recommendation of the Review Board and impose the sanction of censure on respondent.

RESPONDENT CENSURED.

Justice CALVO took no part in the consideration or decision of this case.

APPENDIX B

BEFORE THE REVIEW BOARD
OF THE
ILLINOIS ATTOREY REGISTRATION
AND
DISCIPLINARY COMMISSION

Administrator's No. 87 SH 76

IN THE MATTER OF: GARY PEEL,
Attorney-Respondent,

No. 2166259

REPORT AND RECOMMENDATION
OF THE REVIEW BOARD

[Filed Feb. 17, 1988]

After full consideration and review of all matters of record, the Review Board concurs with the findings of fact and conclusions of law of the Hearing Board and recommends that the Respondent be censured.

The Report and Recommendation of the Hearing Board is attached.

Respectfully submitted,

WATTS C. JOHNSON,
Chairman
HERBERT J. BELL
MICHEL A. COCCIA
C. WILLIAM FECHTIG
MARTIN L. SILVERMAN
Members, Review Board

Members John C. Menk and Marshall A. Susler did not participate. This matter decided February 12, 1988.

APPENDIX C

BEFORE THE HEARING BOARD
OF
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

No. 2166259

IN THE MATTER OF: GARY PEEL,
Attorney-Respondent.

REPORT OF THE HEARING PANEL
FINDINGS OF FACTS, CONCLUSION OF LAW AND
RECOMMENDATIONS OF THE HEARING BOARD

[Filed Aug. 25, 1987]

This matter was heard on July 27, 1987, before a Panel of the Hearing Board of the Attorney Registration and Disciplinary Commission upon the administrators Complaint consisting of one Count. The Complaint alleges the Respondent was licensed to practice law in Illinois on November 14, 1968. The administrator was represented by Daniel A. Drake and William Moran III and the Respondent by Robert W. Bosslet. Members of the Hearing Board Panel were Harland D. Warren, Chairman; Lloyd Schwiebert and Michael Flynn.

Count I alleged violation of Canon 1, Rule 1-102 (1), (Misconduct-violates a discipliary rule); also Canon 2, Rule 2-101 (b), (Publicity and Advertising) and Rule 2-105 (a) (3), (Limitation of practice-"certified", or a "specialist".)

On Motion of Mr. Drake, to which Mr. Bosslet had no objection, the Complaint was amended on its face as follows: Line 4 of the 1st paragraph, the word "trial" was added to read—"Certified Civil *Trial* Specialist". Motion allowed.

On July 21, 1987, the Respondent filed a Second Motion to Continue, indicating he was scheduled to begin a jury trial, medical malpractice suit, at 10:00 a.m., July 27, 1987, which had been scheduled for several months. This Motion for continuance was denied by the panel. Involved was the plaintiff from California, and Medical Doctors from Springfield and Jacksonville, Illinois and State of Michigan. He also recited additional reasons for a continuance including possible intervention as Amicus by the Illinois Society of the National Board of Trial Advocacy,

As for his scheduled jury trial (on Hearing date of July 27, 1987), panel member Michael Flynn brought to his attention that proof of service was dated July 8, his Motion for Continuance dated July 21, a lapse of time, 12 to 13 days. Mr. Bosslet then chose to proceed with the Hearing.

On July 7, 1987, Respondent filed a Motion under Rule 766, (b) (4), that the Hearing be "neither private nor confidenital". On July 9, 1987, the Administrator responded that he would no longer consider this matter to be private or confidential.

It was brought to the attention of the Panel, by the Administrator that Nick Geranious of the Associated Press in Springfield, IL, was in the witness room. The Chairman ruled, that since the Respondent had moved to waive the confidential proceedings rule, he should be permitted to attend the Hearing. The Chairman then inquired of Respondent's attorney, Mr. Bosslet, if there were any other nonessential persons that he wished to be in attendance. Mr. Bosslet replied in the negative. Mr. Geranious was seated in the Hearing Room.

FINDINGS OF FACTS

The Respondent, currently maintains law offices in Edwardsville (Madison County), Illinois, being licensed in Illinois, Missouri and Arizona.

In the year 1983, Respondent changed his letterhead to holding himself out as "Gary E. Peel, Certified Civil Trial Specialist—By the National Board of Trial Advocacy." (Adms Ex. #1) He testified that the possible conflict (violation) did not cross his mind until he received a letter from the Administrator dated April 15, 1986, advising him, that his letterhead may be in violation with Rule 2-105 (a) (3). (Adms Ex. #2)

Regardless, he still continued using the same letterhead in his correspondence. On April 28, 1986, Respondent wrote to the Administrator setting forth his rationale and reasons for continuing the use of his letterhead as a "Certified Civil Trial Specialist." (Adms Ex. #3). His letter to the Administrator took the position that lawyer specialty advertising "constitues a form of commercial free speech, proected by the first amendment, and that advertising by attorneys may not be subjected to blanket suppression." Also, that lawyer advertising may only be regulated or otherwise subject to restraint, where it is false, deceptive or misleading. (IN RE R.M.J. 455 U.S. 191, 102 S.Ct. 929, 71 L. Ed. 2nd 64 (1982).

The Respondent testified that after written and oral "screening tests, The National Board of Trial Advocacy of Washington, D.C., had issued him a "Certificate in Civil Trial Advocacy, dated September 1, 1981. (Resp. Ex. #1) After 5 years it could be renewed by the same screening tests, that it was renewed under date of August 31, 1986. (Resp. Ex. #2)

CONCLUSION OF LAW

The Illinois Supreme Court has the inherent authority to regulate the practice of law. In the case of IN RE: Day, 181 Ill., 73, (1899), the above rule was established,

as the result of a Legislative Act providing for the admission of attorneys upon receiving a diploma after two years of law school. This inherent power has been exercised by our Supreme Court, including the promulgation of Rule 2-105, Limitation of Practice, and in particular, (a) (3), no lawyer may hold himself out as "certified" or a "specialist". The Respondent, by holding himself out, on his letterhead as "Gary E. Peel, Certified Civil Trial Specialist—By the National Board of Trial Advocacy," is in direct violation of the above cited Rule.

We hold it is "misleading" as our Supreme Court has never recognized or approved any certification process.

RECOMMENDATION

It is the recommendation of the HEARING PANEL that the Respondent be censured in accordance with Rule 771, (g).

/s/ Harland D. Warren
HARLAND D. WARREN
Chairman

/s/ Lloyd Schwiebert
LLOYD SCHWIEBERT

/s/ Michael Flynn
MICHAEL FLYNN

APPENDIX D

Law Offices of Gary E. Peel
2 Center Grove Road
Edwardsville, Illinois 62025
(618) 692-0500

Gary E. Peel
Certified Civil Trial Specialist
By the National Board of Trial Advocacy
Licensed: Illinois, Missouri, Arizona

Debra J. Meadows
Licensed: Illinois
Missouri

APPENDIX E

Law Offices of Gary E. Peel
2 Center Grove Road
Edwardsville, Illinois 62025
(618) 692-0500

Gary E. Peel
Certified Civil Trial Specialist
By the National Board of Trial Advocacy
Licensed: Illinois, Missouri, Arizona

Scott Carl Cain
Licensed: Illinois

April 28, 1986

Attorney Registration and Disciplinary Commission
Supreme Court of Illinois
1 N. Old Capitol Plaza
Springfield, IL 62701

Attention: William F. Moran III

Re: Gary E. Peel at the Charge of the Administrator
No. 86-SI-3301

Dear Mr. Moran:

I have received your letter of April 15, 1986 and in response thereto I set forth the following:

My letterhead, which contains the terminology "Certified Civil Trial Specialist by the National Board of Trial Advocacy" would appear to conflict with Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility.

Since this Rule was initially promulgated, however, substantial inroads have been made into advertising and free speech when applied to the legal profession. The United States Supreme Court in *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977) found prohibitions on the advertising of legal fees unconstitutional. Later, the United States Supreme Court in *In Re R.M.J.* 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982) reiterated its statement in *Bates*

that lawyer specialty advertising constitutes a form of commercial free speech, protected by the first amendment, and that "advertising by attorneys may not be subjected to blanket supression".

I do not believe that Rule 2-105(a)(3) survives these United States Supreme Court decisions.

* * * *

To compound matters, the Illinois Supreme Court disciplinary rules do authorize an attorney to hold himself out to the public as having expertise in the fields of patent, trademark, and admiralty law, even without any criteria for doing so and even without any requirement that the attorney be qualified in those areas specified (see Rule 2-105(a)(1) and (2).

* * * *

Intending no disrespect to the Illinois Supreme Court or the Attorney Registration and Disciplinary Commission, it is my position here that Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility is unconstitutional on its face and as applied in one or more of the following respects:

A. It violates the First Amendment of the United States Constitution.

B. It violates Article I, Section 4 of the Constitution of the State of Illinois.

C. It violates Article 1, Section 2 (Equal Protection Clause) of the United States Constitution, and

D. It violates Article I, Section 2 (Equal Protection Clause) of the Constitution of the State of Illinois.

* * * *

Once you have had an opportunity to review this letter and perhaps also review other decisions which have addressed this issue (*Johnson v. Director of Professional Responsibility*, 341 N.W. 2d 282 (S. Ct. of Minn. 1983)

I would appreciate being advised as to the Commission's attitude on this matter.

Very truly yours,

/s/ Gary E. Peel
GARY E. PEEL

APPENDIX F

EXCERPT OF HEARING TRANSCRIPT

(Page 13)

* * * *

MR. FLYNN: Well, I appreciate your thought. I'd just like the record to reflect those dates because there's quite a lapse of time from the time you would have received the notice of the hearing and the time you filed the motion to continue.

CHAIRMAN WARREN: Any other preliminary matters?

(No response.)

CHAIRMAN WARREN: Mr. Moran?

MR. MORAN: May it please the Board, in this disciplinary case, the facts are going to be about as simple as any case this Board has probably ever seen. The evidence will show that beginning in 1983 and continuing until the present, Respondent has held himself out through his office letterhead as being a certified civil trial specialist by the National Board of Trial Advocacy.

* * * *

APPENDIX G

EXCERPT OF HEARING TRANSCRIPT

(Pages 20-26)

CHAIRMAN WARREN: Any objection?
MR. BOSSLET: No, sir.
CHAIRMAN WARREN: Admitted.

(Whereupon Administrator's Exhibit Number 2 for identification was admitted into evidence.)

MR. MORAN: Q So is it correct to say that it was on or about April 15, 1986, that you became aware of the fact that your leterhead might be in conflict with the rule of the Illinois Code of Professional Responsibility?

A That's correct.

Q After that time period, did you continue to use letterhead that was substantially similar in as held [sic] yourself out as a certified civil trial specialist?

A Yes.

Q And you continued to use letterhead substantially the same as you have described before to this day, is that correct?

A That's correct, to the extent that we are concerned here.

Q You just, briefly who this letterhead goes to, you send out office correspondence on this letterhead?

A That's correct.

Q You correspond with other attorneys with this letterhead?

A Yes.

Q It's used in the ordinary course of your business of practicing law?

A Yes, it is.

Q As a matter of fact, you even corresponded with the Administrator's office using this letterhead?

A Sure did.

Q I'll show you what's been marked as Administrator's Exhibit Number 3. Could you identify this?

A Yes. This is the original letter of mine dated April 28, 1986, addressed to the Attorney Registration and Disciplinary Commission in which I responded to your earlier exhibit and set forth the rationale and reason behind my use of the certification and the constitutional reasons why I felt that I could not be restricted from utilizing that certification.

MR. MORAN: At this time, the Administrator would offer Administrator's Exhibit Number 3 for the limited purpose of showing that Respondent does correspond using this stationery, this is one example of correspondence where this stationery has been used.

CHAIRMAN WARREN: Mr. Bosslet?

MR. BOSSLET: My only comment, sir, would be that I have no objection to it. I wouldn't want it to be admitted for that limited purpose because I think the cases cited and Respondent's opinions in there are worthy of the Board's consideration, too, so if Mr. Moran doesn't want to adopt it for that purpose, I will.

CHAIRMAN WARREN: That document speaks for itself and is admitted.

MR. MORAN: I will certainly state that the Administrator will have some objections to some of the law that is cited, but—.

CHAIRMAN WARREN: Admitted.

(Whereupon Administrator's Exhibit Number 3 for identification was admitted into evidence.)

MR. MORAN: The Administrator has no further questions and would rest his case at this time.

CHAIRMAN WARREN: Does the Panel have any questions of this witness?

Mr. Schwiebert?

MR. SCHWIEBERT: I think not.

MR. FLYNN: I don't have any, thank you.

CHAIRMAN WARREN: Thank you. Next witness?

MR. MORAN: The Administrator has no further witnesses and would rest at this time.

CHAIRMAN WARREN: Mr. Bosslet? Do you wish to proceed?

MR. BOSSLET: Yes, sir, I do. I would question Mr. Peel.

GARY E. PEEL

called as a witness in his own behalf, having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BOSSLET:

Q Gary, could you tell the Board in what states you are licensed to practice and in what years you were admitted.

A Admitted to practice in the State of Illinois in 1968; the State of Arizona, 1979; and the State of Missouri in 1981.

Q And could you tell us how it was you came to be admitted, whether by reciprocity or examination?

A I was admitted by reciprocity in Missouri and by examination in Arizona. Also by examination in Illinois.

Q And in what federal courts are you licensed to practice, Gary?

A Supreme Court of United States, 1975; United States Court of Appeals for the Seventh Circuit in 1974; United States Court of Appeals for the Eighth Circuit in 1980; United States District Court for the Southern District of Illinois, 1971; United States District Court for the Eastern District of Missouri in 1982.

Q Of what professional organizations or associations are you a member?

A I am a member of the American Bar Association. I'm the vice-chair of the Insurance and Tort Committee of the General Practice Session. I'm also a member of the Illinois State Bar Association; Arizona State Bar Association; Missouri State Bar Association; Madison

County Bar Association of which I was secretary in 1972 to 1973, vice-president from 1982 to 1983 and president from 1983 to 1984. Also a member of the Illinois Trial Lawyers Association; the Association of Trial Lawyers of America; I am past secretary of the Tri-City Bar Association, 1978 to 1979 and I'm also currently a member of the Metropolitan Municipal Bar Association.

MR. MORAN: Mr. Chairman, the Administrator wants to point out for the record that we have no objection—it appears as if Respondent is reading from a prepared document or piece of paper. We have no objection to him doing that for background. I'd just like to note that when it comes time for substantive testimony, that we would have an objection if he continues to read off a piece of paper.

CHAIRMAN WARREN: You're going to be overruled at this time. If you want to read, let the record so show.

MR. BOSSLET: It's his resume. If you want, we can mark it as an exhibit—.

MR. MORAN: Oh, no, we have no objection for background. We just wanted to point it out for the record.

MR. BOSSLET: Q Gary, have you lectured or taught any subjects associated with the practice of law?

A Yes, I have. I've taught for the Illinois Institute of Continuing Legal Education, courses basically tied into trial practice. I have also participated as both a lecturer and a teacher for the Association of Trial Lawyers of America, their basic trial advocacy course in which basically younger lawyers are videotaped and critiqued on a hypothetical-factual situation. That was done in St. Louis a couple of years ago at the St. Louis University Law School.

Q Now, how many jury-tried cases have you tried to verdict, Gary?

A In excess of 800 [sic—should read "a hundred"].

Q What about nonjury cases you've tried to conclusion?

A I would estimate in excess of three of [sic] four hundred.

Q And then what about cases that may not have gone to verdict, but cases in which you were acting as attorney, hearing motions, taking depositions, general preparation of a case that may not have had to be tried? How many cases have you handled?

A Well over a thousand.

Q Now, in 1981, you became certified by what organization?

A National Board of Trial Advocacy.

Q Do they have a particular field in which you are certified?

A Yes. At that time, and in fact I think even currently, they only have two available fields of specialization. One is as a criminal trial specialist and the other is civil trial specialist, and I was certified as a civil trial specialist.

* * * *

APPENDIX H

EXCERPT OF HEARING TRANSCRIPT

(Pages 29-30)

* * * *

A There was a newspaper announcement in the business section of the local Edwardsville newspaper which said that basically that Gary Peel had been recently certified as a civil trial specialist by the National Board of Trial Advocacy * * *. I have not placed it in the yellow pages, I've not mailed out brochures, advertisements, or other types of printed materials on the matter.

* * * *

Q Does it appear in Martindale-Hubble?

A As a matter of fact, it does now, that's correct. I don't believe it did in 1983. It may have been the last two or three issues that it appeared, yes.

Q Now, in the event someone would want to verify your specialization or certification, what bases are there for that?

A Well, it can be verified through the office of the National Board of Trial Advocacy which are located at 1050 31st Street Northwest, Washington, D.C., zip code 20007-4499, phone number 202-965-3500.

Q Now, Gary, do you feel that your publicizing, for lack of better terms, your certification on your letterhead is in any way useful or beneficial to the public?

MR. MORAN: Objection. That calls for an opinion —I don't know what the foundation for Respondent's response to that question is going to be.

CHAIRMAN WARREN: Sustained.

* * * *

APPENDIX I

EXCERPT OF HEARING TRANSCRIPT

(Page 35)

CHAIRMAN WARREN: Admitted.

(Whereupon Respondent's Exhibit Number 2 for identification was admitted into evidence.)

MR. BOSSLET: Q Let me finally ask you, Mr. Peel, because I alluded to it in my opening statement, has any client or layman ever questioned or expressed concern about your listing yourself being certified as the National Board of Trial Advocacy—.

MR. MORAN: Objection. Calls for hearsay.

CHAIRMAN WARREN: We'll let him answer.

THE WITNESS: A No, I have never had any client or lay person question its propriety. The only thing that I have, as a result of the charges brought here today, I have called this to the attention of various other attorneys in my geographical area who have expressed some dismay with the charges, but there has been nothing from the lay person.

MR. BOSSLET: Q Have any attorneys, any other practicing attorneys complained to you about your listing that certification?

MR. MORAN: Same objection.

CHAIRMAN WARREN: Substained.

* * * *

APPENDIX J

EXCERPT OF HEARING TRANSCRIPT

(Pages 37-41)

* * * *

CHAIRMAN WARREN: You have any response?

MR. MORAN: Well, the first point that the Administrator would make is clearly here we have a violation of Rule 2-105(a)(3), so the Administrator's complaint should stand and go to decision by this Board and should not be dismissed at this time.

Secondly, I believe it's a question of law whether or not the facts that have been presented here today show that what Respondent places on his letterhead is misleading or not and that's a question that is going to have to be decided by this Board and the Administrator will ask specifically that the Board make a ruling, one way or another, whether they believe that putting certified civil trial specialist on Respondent's letterhead is misleading when the Supreme Court, who has the inherent authority to regulate all facets of the practice of law, when the Supreme Court has not said that Respondent could do that or any other attorney could do that. For those two reasons, the Administrator objects to Respondent's motion to dismiss.

CHAIRMAN WARREN: Motion to dismiss is denied.

Are we ready now—evidence closed? Mr. Bosslet, is that—.

MR. BOSSLET: Yes, sir, that's right.

MR. MORAN: That's correct.

CHAIRMAN WARREN: And the Administrator?

MR. MORAN: That's correct.

CHAIRMAN WARREN: We have closing statements?

MR. MORAN: I have, Mr. Chairman.

CHAIRMAN WARREN: You may proceed.

OPENING ARGUMENT

BY MR. MORAN:

MR. MORAN: May it please the Board, as I've stated, the facts of this case are about as simple as you're going to see in a disciplinary case. Respondent places on his letterhead that he is a certified civil trial specialist in direct contravention of Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility which in pertinent parts states that no lawyer may hold itself out as, quote, certified or a specialist. In this case, Respondent has done both.

In the Administrator's complaint, Respondent is also charged with violating two other disciplinary rules. The first being Rule 1-102(a)(1) of the Code which reads—a lawyer shall not violate a disciplinary rule. The evidence shows that Respondent wasn't cognizant when he first had this letterhead created in 1983, that there might be a violation involved with his placing the words "certified civil trial specialist" on his letterhead. Respondent did testify, though, that he was aware generally of the proscriptions of the Illinois Code of Professional Responsibility. Respondent then testified that in April of 1986, he received notice from the Commission that there may be a problem with his letterhead having to do with Rule 2-105(a)(3). As a matter of fact, I think not even a close analysis of Respondent's testimony shows that he admits that he has violated this rule by placing that on his letterhead. His defense though is that that rule is unconstitutional.

Respondent has violated the rule that says that a lawyer shall not violate a disciplinary rule by intentionally going forward and keeping this letterhead as it is and not changing it. That, the Administrator argues is a violation of the rule.

Finally and probably most importantly, Respondent has made a misleading statement in violation of Rule

2-101(b). Rule 2-101 deals with publicity and advertising. I don't feel that there's any question here that Respondent's letterhead is advertising. Too, Rule 2-101(b) in its entirety says such communication, speaking of advertising or publicity, shall contain all information necessary to make the communication not misleading and shall not contain any false or misleading statement or otherwise operate to deceive. As I stated previously, the Illinois Supreme Court has the inherent authority to regulate the practice of law. This was first held by the Court in 1899 in the case of, In Re: *Day*, 181 Ill. 73 and again 1899.

MR. SCHWIEBERT: What's that citation again?

MR. MORAN: 181 Ill., not Illinois Second, Page 73, 1899. The Court has continued to hold in disciplinary cases down through the ages and to the present that they have the inherent authority to regulate all facets of the practice of law which would also include what an attorney can advertise or what he cannot advertise.

The reason Respondent's letterhead in this case is misleading is because a member of the public or another attorney who picked up or saw Respondent's letterhead would, because they were cognizant of the inherent authority of the Supreme Court to regulate the practice of law, they would think that the Supreme Court of Illinois has put their stamp of approval on this letterhead and that Respondent would be allowed to place the term "certified civil trial specialist" on his letterhead when, in fact, the Court has never either recognized or even dealt with any certification process other than what is mentioned right now at this present time and for the past in the Illinois Code of Professional Responsibility.

In this case, as I stated previously, the Administrator is going to ask the Panel to make a specific finding, one way or another, it's a very important point in this case, whether or not the Board feels that this is misleading and we ask that either way that the Board make a specific finding in their report on this question.

As far as a recommendation for discipline is concerned in this case, the Administrator is going to recommend that Respondent be censured in this situation. This is public misconduct that should be addressed with public discipline. Respondent has testified that he has used this letterhead which is in contravention of a disciplinary rule since 1983. * * *

* * * *

APPENDIX K

EXCERPT OF HEARING TRANSCRIPT

(Pages 49-50)

Briefly summarizing what the Administrator's position on the constitutionality of this rule is, that if the Board finds that Respondent's conduct is misleading, Respondent cannot be seen to make a constitutional argument, he cannot be protected by a constitutional argument, he can't argue that the statute itself is basically unconstitutional because he can't hide behind the fact that what he's doing is misleading. He has to stand on that question and not the constitutional question.

Secondly, as discussed in the Administrator's memorandum, if the Board doesn't find that Respondent's conduct is misleading, the State can still regulate or ban certain types of lawyer advertising if the State is advancing a substantial State interest. And that the regulation or ban is closely tailored to that interest. In this case, the interest is clearly the Court's interest in having bogus certified certification groups pop up or things that you just sign in correspondence courses, things of that nature, where the certification would be meaningless. The Administrator doesn't argue either way about the meaningfulness of a certification by the National Board of Trial Advocacy, but by having a complete ban on saying attorneys are certified or specialists, that is tailoring a substantial State interest that is protecting people from either meaningless or false information by having that ban an entire ban that is the best possible remedy to the situation that is before the Court.

Again, this is pointed out more fully and discussed more fully in the Administrator's memorandum that was filed in opposition of Respondent's motion to dismiss and I would ask that the Board read that memo again.

MR. SCHWIEBERT: You have no additional cases that are not mentioned in the memo?

MR. MORAN: That's correct.

MR. SCHWIEBERT: Do you have any memorandum of cases that have been cited or briefs to file?

MR. BOSSLET: We'll get cites to the Board of those cases we referred to.

MR. SCHWIEBERT: How soon would you be sending that in?

MR. PEEL: I'm starting a malpractice trial today, probably will go seven or eight days. I think a week or two beyond that. Twenty-one days?

* * * *